

## **EARLY NEUTRAL EVALUATION PROGRAM**

### **2004 ANNUAL REPORT**

November 1, 2003 - October 31, 2004

## I. INTRODUCTION

Since July 1, 1994, the District of Vermont has been operating its mandatory Early Neutral Evaluation (ENE) program in hope that it would reduce the time and costs of traditional litigation by enhancing direct communication between parties, identifying and clarifying issues, and positioning cases for early resolution by settlement.

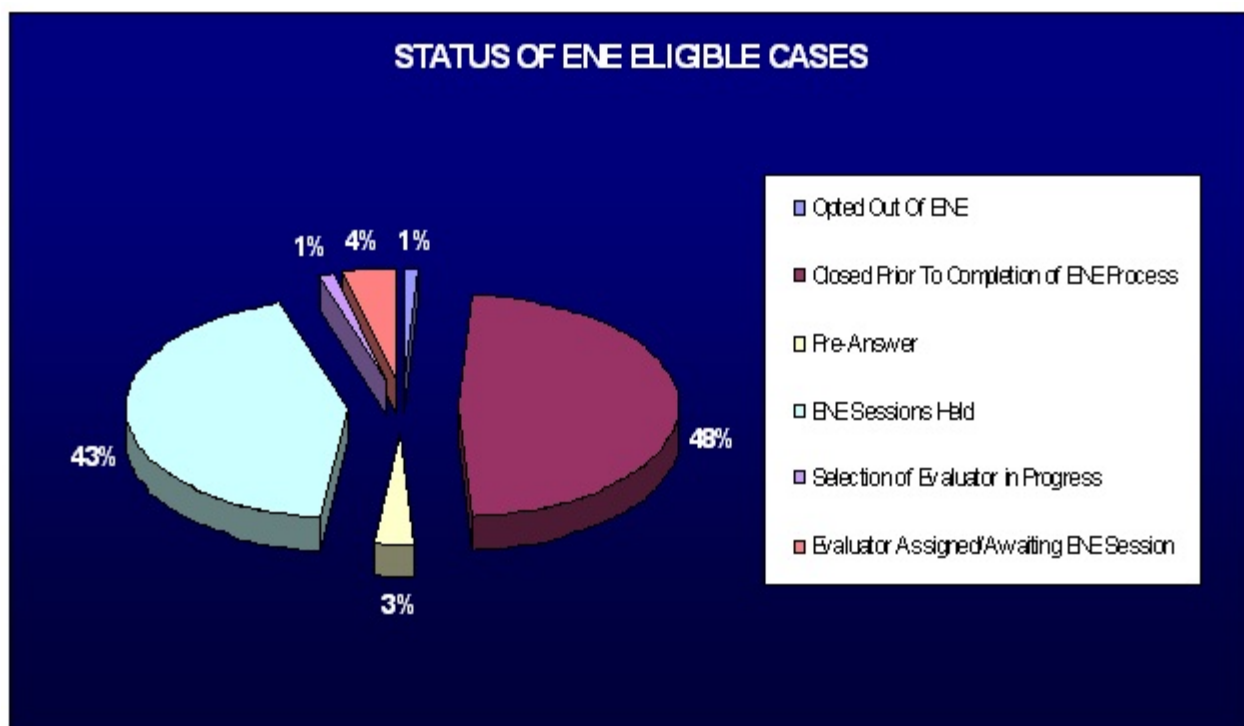
This annual report offers a statistical overview of the ENE program, as well as an overall summary of the feedback from the evaluators and attorney participants for the period November 1, 2003 through October 31, 2004. It also compares this year's results to previous years in order to gauge the effectiveness and progress of the program over time.

## II. STATISTICAL ANALYSIS

### A. ENE Usage

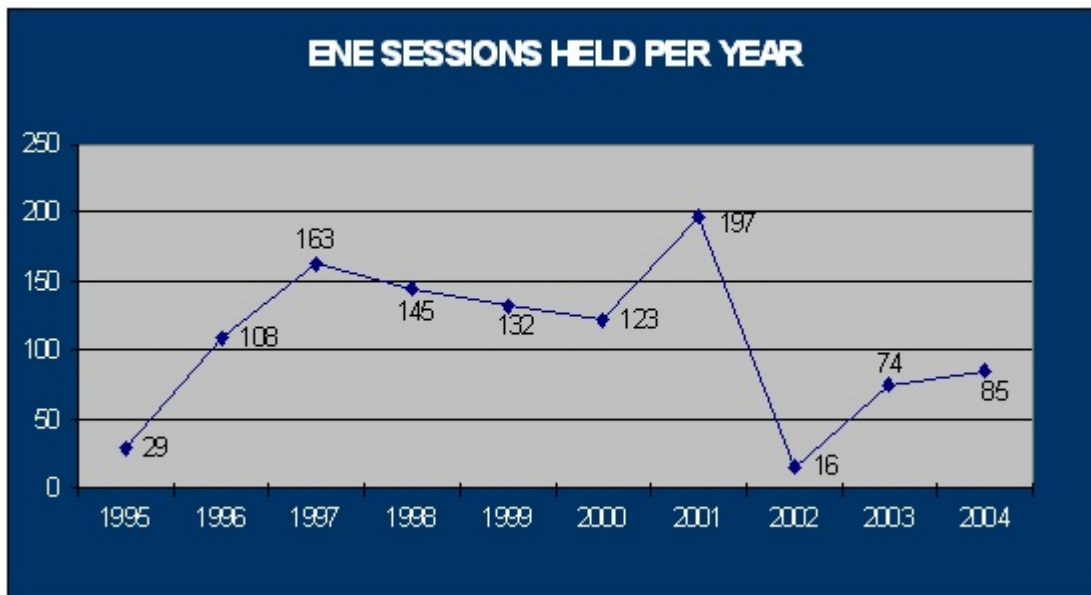
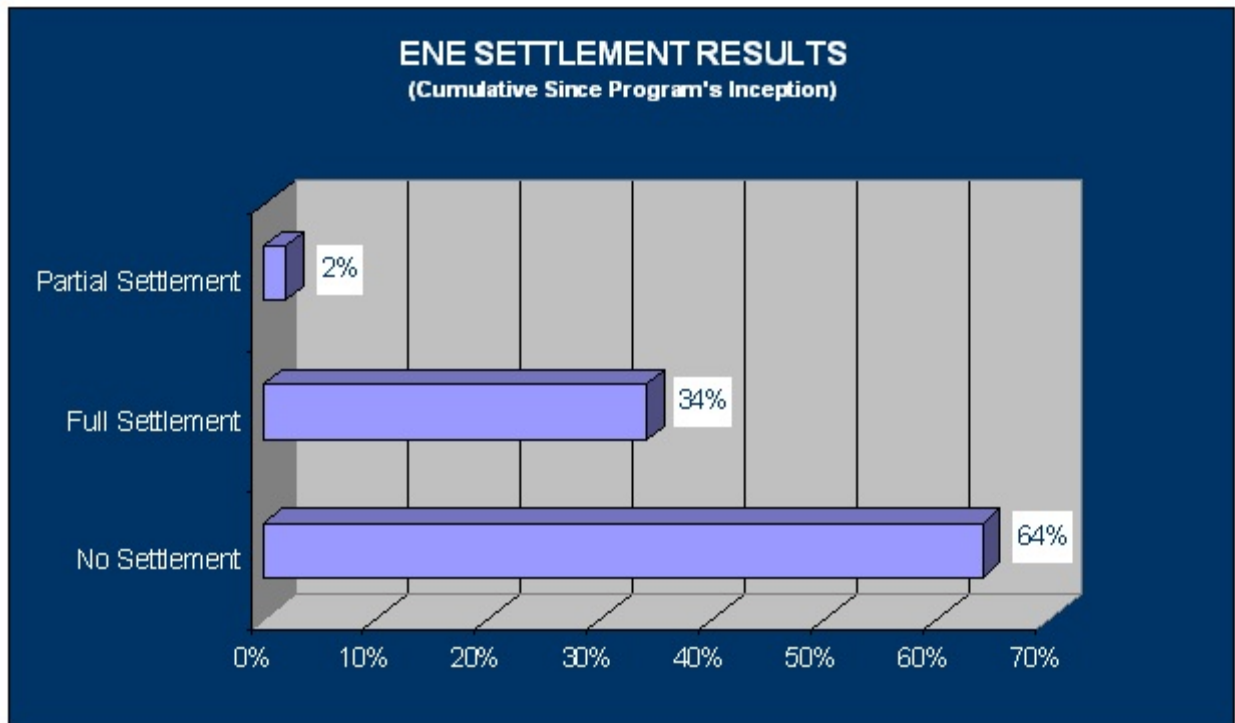
The number of ENE sessions held during 2004 was 85, which is slightly higher than the number of sessions held during 2003, which was 74.

The cumulative total of ENE eligible cases since the program's inception now totals 2,145. The graph below illustrates the current status of ENE eligible cases. Forty-three percent of those cases have held an ENE session, 48 percent were closed prior to completion of the process, 4 percent have an ENE evaluator assigned and are awaiting a session, 3 percent are in the pre-answer stage, and 1 percent are in the selection phase for and evaluator. Only one percent were allowed to opt out of the ENE process.



## B. ENE Results

The graphs displayed below illustrate cumulative results for all ENE eligible case over the past ten years, including the number of ENE sessions held per year on a per-year basis.



### C. Disposition of ENE Eligible Cases

Table A compares the nature of suit category with the point of disposition for all ENE eligible cases. It also displays the mean disposition time in each category. This information suggests which type of cases benefit most from the program and provides a general indication of the duration of case life before termination.

**Table A - Disposition By Nature of Suit**

NATURE OF SUIT	WHEN DISPOSED			MEAN DISPOSITION TIME (in days)
	Pre- ENE Session	At ENE Session	After ENE Session	
110 Contract: Insurance	58%	11%	31%	358
190 Contract: Other	63%	13%	24%	320
350 PI: Motor Vehicle	28%	28%	44%	367
360 PI: Other	33%	29%	38%	267
362 PI: Med Malpractice	63%	19%	18%	317
365 PI: Product Liability	40%	18%	42%	448
440 Civil Rights: Other	64%	10%	26%	304
442 Civil Rights: Jobs	37%	23%	40%	375
791 Labor: ERISA	49%	22%	29%	273

### III. ATTORNEY FEEDBACK

Survey questionnaires were sent to counsel involved in ENE cases during the past year and counsel were asked to reflect upon their experiences with the program and its effectiveness. Attachment 1 shows the results of our survey. The evaluations continue to suggest that ENE is generally thought of as a positive experience. Sixty-four percent of the attorney participants reported ENE as helpful in the settlement of their cases, supporting the program as a useful and practical tool for encouraging settlement talks. Additionally, 40 percent of the participants believed that ENE helped decrease the costs of litigation.

In summary, based on the majority of positive feedback provided, it is evident that the ENE program seems to be fostering a perception of success and continues to gain the acceptance of the bar as a viable and efficient alternative to traditional litigation. Nearly 30 percent of the participants believed their case settled earlier than it would have if there were no involvement in the ENE process. The program seems to be meeting its objectives - which are opening the lines of communication and encouraging settlement talks.

**"I practice in Oregon, where we do not have an "early" mediation program. I was very impressed with the program. We have a very collegial, professional bar, as I found in Vermont, but we settle fewer cases earlier on just because of procedure and inertia. I believe ENE got us quickly to the same point we otherwise would have eventually reached after wasting a lot of time and money."**

**- Out-of-State Attorney on ENE program**

#### **IV. EVALUATOR FEEDBACK**

Attachment 2 represents the ENE evaluators' views on the program. Results of this year's questionnaire were encouraging in the fact that 78 percent of the evaluators rated counsels' preparation and efforts in the ENE process as "excellent"- an increase of 18 percent from last year's survey. In addition, 50 percent of the evaluators responded that they perceived an increase in attorney participation and attitude at the ENE sessions.

This feedback gives the impression that attorneys are gradually becoming more accepting of the ENE process as a valuable instrument in the process.

#### **V. EVALUATOR USAGE**

Attachments 3A and 3B indicate the cumulative number of ENE assignments received by evaluators. Attachment 3A references those evaluators on the court's official roster and attachment 3B represents those evaluators who are not on the roster but were stipulated to by the parties. Each attachment displays the cumulative results of their sessions.

While the court's ENE administrator continues to make every effort to assign evaluators based on their experience and type of case, the statistics appear to indicate that there is an on-going increase in the number of parties who prefer to stipulate to their own evaluator. Attorneys have attributed this development to the fact that they would prefer to have a "known commodity"- someone they know either professionally, personally, or by reputation. It also appears from the statistics that some evaluators have earned a reputation for providing quality work in resolving cases and parties are naturally gravitating towards their selection as evaluators.

## **VI. UPDATES**

### **A. Bankruptcy Involvement**

To date, a total of four bankruptcy cases have participated in the ENE process.

While the numbers are too small to reach a statistically valid conclusion regarding its effectiveness, Bankruptcy Judge Colleen Brown endorses ENE as a viable option in bankruptcy cases. When asked whether ENE was an effective tool for the Bankruptcy Court to utilize, Judge Brown stated that “the bottom line is that although it does not get used all that much, I believe it is an extremely valuable alternative to have available and see it as an effective tool in the bankruptcy court.”

### **B. Evaluator Training**

There were no scheduled training seminars in 2004.

## **VI. CONCLUSION AND FUTURE OUTLOOK**

The ENE program continues to be a success in terms of providing a practical and cost efficient alternative for encouraging settlement of civil cases. Over the duration of the program, a significant portion of the cases that have participated in ENE have settled as a result of the process. Thus, the program has been a positive force towards settlement.

ENE has been seen to result in better “feelings” by the parties, even if they don’t settle the case. At the very least, ENE offers parties a controlled setting to peacefully discuss the issues of their cases and provides an effective opportunity not only to potentially reach settlement, but also early enough to save litigation costs. It enhances communication, narrows issues, structures the discovery process, and encourages settlement.

The Court’s pending civil caseload has gradually increased each month during 2004. The Court’s pending criminal defendants are also increasing, and three major, lengthy criminal trials are expected to go forward during 2005. It is the Court’s hope over the next year that we will continue to see effective use of the ENE program as a useful alternative dispute resolution option envisioning that it will ease the burden on the busy trial calendars of our district’s judges.

ENE offers many advantages to our district and has proven to be a cost effective alternative to traditional litigation. The Court will continue to monitor and evaluate the program in order to measure its degree of success and to identify areas for improvement.

## **VII. COMMENTS**

Any commentary or suggestions related to the ENE program may be forwarded to ***Jeff Eaton at 802-951-6395 x 118, or [Jeffrey\\_Eaton@vtd.uscourts.gov](mailto:Jeffrey_Eaton@vtd.uscourts.gov)***.

## **ENE Case Closing Questionnaire**

### **District of Vermont**

**1. The primary reason(s) this case closed when it did is/are:**

If your Case Closed Before ENE Session was Held

- 33% Facts/Issues were straightforward so lengthy discovery was not needed
- 7% Settlement was at least partly worked out before the case was filed.
- 10% Client changed mind - case dropped or to be pursued in another venue
- 7% ENE process imminent - discovery checklist, case summary, etc. due soon
- 43% Other

If your Case Closed After ENE Session was Held

- 31% Discovery
- 17% Decision on controlling motions by the Court
- 19% Trial date set/approaching
- 2% Attorney/client schedule only recently permitted full attention on this case
- 31% Other

**2a. Was the ENE process as a whole helpful in settling this case? (Please consider "intangible effects" of ENE such as opening communication between the parties, identifying strengths and weaknesses of each side, getting clients to be more realistic, etc.**

- 31% Very helpful
- 33% Somewhat helpful
- 34% No effect
- 2% Detrimental

**2b. If you checked "Very" or "Somewhat helpful" above, what about the ENE process helped most in resolution of the case?**

- 24% Active Participation of client in the session, i.e., direct communication with other party(ies), hearing strengths & weaknesses of their own case, etc.
- 15% Prompted counsel to exchange information and/or "get moving" on discover sooner than we otherwise might have
- 6% \$500 fee prompted consideration of settlement before that stage was reached
- 25% Evaluator's methods of conducting the session & discussing the case
- 18% Prompted all to consider settlement earlier then we otherwise might have
- 1% Combination of all
- 5% Improved pretiral settlement discussions as trial approached, e.g., court pretrial conference
- 7% Other

**3. Do you think this case settled any earlier then it would have if there were no ENE?**

- 27% Yes
- 56% No
- 17% No way to tell

**Did the ENE process help decrease the cost of the litigation, either because of the**

**4. early settlement, or in other ways?**

- 40% Yes
- 60% No

## COMMENTS AND SUGGESTIONS ON THE PROGRAM

- ▶ “Generally speaking (not as to this case), ENE is too early in the process. Instead at 1/2 way through the discovery schedule, it should be 3/4+. Parties need to be educated about each other’s positions in order to settle, particularly couples cases. Most of ours have taken a second ENE – the first one was a waste of time/\$\$. Otherwise, a great program.”
- ▶ “I practice in Oregon, where we do not have an “early” mediation program. I was very impressed with the program. We have a very collegial, professional bar, as I found in Vermont, but we settle fewer cases earlier on just because of procedure & inertia. I believe the ENE got us quickly to the same point we otherwise would have eventually reached after wasting a lot of time and money.”
- ▶ “Excellent evaluator.”
- ▶ “A valuable asset.”
- ▶ “Bob Hemley was a good evaluator.”
- ▶ “This case was an exception to the rule. Usually ENE (mediation) is very valuable, but best done after discovery & IMEs are completed by the defense.”
- ▶ “ENE, in my judgment, is always useful.”
- ▶ “Excellent idea - I wish we had it in NY!”
- ▶ “Generally a very good and useful program.”
- ▶ “Even though case did not settle through ENE, the process was helpful to help the parties understand what was at stake.”
- ▶ “Too early! Parties need to be educated about the case – the ones suitable for early settlement one typically settled through counsel/voluntary mediation; the tougher cases require more prep. time to have the serious attention of all!”
- ▶ “It’s a great program. That’s why I filed in Federal Court whenever I can. (Plus the friendly courteous staff.)”
- ▶ “Our evaluator, Jim Spink, was very good but the parties were simply too far apart.”
- ▶ “ENE should not be mandatory. There are cases that are not suited for the process.”
- ▶ “It’s a beneficial program. This case had parties with different views of reality, and this had to be tried.”
- ▶ “I used ENE in a previous case where it was 100% effective on settling the case - an extremely complex one - on the ENE date. While ENE played no role in the instant case, I have found it very useful.”



- ▶ **“I prefer the mandatory mediation program in state court to ENE. I do not find the ENE panel of evaluators to be uniformly capable. The local rules relating to scheduling of evaluators are unnecessarily rigid.”**
- ▶ **“Case did settle faster than if ENE session were held later but not without less cost for Plaintiff who needed to complete expert disclosure prior to session.”**
- ▶ **“P.B. Joslin, Esq. does an excellent job as ENE evaluator. Very experienced and skilled trial lawyer helps both sides evaluator case effectively.”**
- ▶ **“Publish a list of all evaluators periodically.”**
- ▶ **“Although this case did not settle, the ENE process was helpful in that it left the door open for further settlement discussion in the event motions were not successful.”**
- ▶ **“While ENE could have settled the case, it was scheduled too early and before parties had complete enough discovery. Later, after discovery was completed, and once trial notice was received, parties scheduled private mediation with Art O’Dea, which was successful.”**

# **Annual ENE Evaluator Questionnaire**

## **District of Vermont**

**1. Considering Attorneys' participation, what percentage falls into each of the categories below regarding the ENE process?**

- 78% Excellent - counsel prepare thoroughly and honestly try to make the process successful for their client/case
- 20% Good - counsel make some effort, but seem a bit hesitant/skeptical
- 2% Indifferent - participate minimally to comply with the local rule
- 0% Negative - do little to no preparation and don't give the process a chance
- 0% Other (please briefly explain)

**1b. Compared to your observations during the first couple of years of the ENE**

**program, does your response above represent --**

- 50% Increase in attorney participation/attitude
- 50% Same attorney participation/attitude as in earlier years
- 0% Worse attorney participation/attitude

**2. Considering the participation of the parties at the ENE session, what percentage falls into each of the categories below?**

- 51% Full active participation
- 36% Some participation
- 12% Neutral - present but did not volunteer input in the process
- 1% Negative - participation hurt the progress of the case
- 0% Other - please describe

**3. From your evaluation experiences, are there any types of cases that are now subject to ENE that should not be?**

None reported.

***COMMENTS OR SUGGESTIONS ON THE ENE PROGRAM:***

No comments or suggestions were received.

**EVALUATOR USAGE AS OF 10/31/04**  
***(Court's Official Roster)***

<b><u>Evaluator</u></b>	<b><u># of Cases Assigned</u></b>	<b><u>Results of Sessions</u></b>
Frederic W. Allen (**)	22	6-Full Settlement 1-Partial Settlement 9-No Settlement 3-Closed Before Session 1-Out of ENE
Edwin Amidon, Jr.	54	7-Full Settlement 28-No Settlement 10-Closed Before Session 2-Out of ENE
Gary Barnes (***)	5	2-Full Settlement 2-Closed Before Session
Alison J. Bell (**)	13	2-Full Settlement 5-No Settlement 2-Closed Before Session 1-Out of ENE
John Bergeron (***)	8	2-Full Settlement 2-No Settlement 1-Closed Before Session
Eileen M. Blackwood	39	13-Full Settlement 14-No Settlement 5-Closed Before Session 2-Out of ENE
Stephen S. Blodgett	39	8-Full Settlement 20-No Settlement 4-Closed Before Session 7-Out of ENE
Samuel S. Bloomberg	16	1-Full Settlement 1-Partial Settlement 10-No Settlement 5-Closed Before Session
John J. Boylan III (***)	7	2-Full Settlement 2-No Settlement
Hon. Alden T. Bryan (**)	19	3-Full Settlement 5-No Settlement 1-Partial Settlement 3-Closed Before Session 6-Out of ENE

<b><u>Evaluator</u></b>	<b><u># of Cases Assigned</u></b>	<b><u>Results of Sessions</u></b>
Joseph F. Cahill, Jr.	25	4-Full Settlement 1-Partial Settlement 13-No Settlement 3-Closed Before Session 2-Out of ENE
Richard T. Cassidy	41	13-Full Settlement 15-No Settlement 7-Closed Before Session 3-Out of ENE
David Cleary (***)	12	3-Full Settlement 5-No Settlement
Stephen R. Crampton	6	1-Full Settlement 1-No Settlement 3-Settled Before Session 1-Out of ENE
Christopher L. Davis	48	10-Full Settlement 24-No Settlement 9-Closed Before Session 4-Out of ENE
Hon. Hilton H. Dier, Jr.	33	8-Full Settlement 1-Partial Settlement 16-No Settlement 7-Closed Before Session 1-Out of ENE
James A. Dumont	31	8-Full Settlement 13-No Settlement 8-Closed Before Session 2-Out of ENE
Ellen M. Fallon (**)	10	4-No Settlement 1-Closed Before Session 2-Out of ENE
William A. Fead	19	7-Full Settlement 5-No Settlement 7-Closed Before Session 1-Out of ENE
John H. Fitzhugh	37	4-Full Settlement 1-Partial Settlement 21-No Settlement 7-Closed Before Session 3-Out of ENE

<b><u>Evaluator</u></b>	<b><u># of Cases Assigned</u></b>	<b><u>Results of Sessions</u></b>
James C. Gallagher	31	6-Full Settlement 15-No Settlement 5-Closed Before Session 2-Out of ENE
Robert P. Gerety, Jr.	38	9-Full Settlement 25-No Settlement 3-Closed Before Session 2-Out of ENE
Michael F. Hanley (**)	18	2-Full Settlement 9-No Settlement 4-Closed Before Session 1-Out of ENE
Robert B. Hemley (**)	21	7-Full Settlement 2-Partial Settlement 7-No Settlement 4-Closed Before Session 1-Out of ENE
John R. Hughes, Jr.	19	2-Full Settlement 1-Partial Settlement 6-No Settlement 5-Closed Before Session 5-Out of ENE
Peter B. Joslin	46	12-Full Settlement 1-Partial Settlement 20-No Settlement 10-Closed Before Session 1-Out of ENE
Mark A. Kaplan	18	7-Full Settlement 1-Partial Settlement 7-No Settlement 3-Out of ENE
Mary Kehoe	13	3-Full Settlement 7-No Settlement 6-Closed Before Session
Mary Kirkpatrick (***)	2	1-Closed Before Session
Catherine Kronk	12	3-Full Settlement 5-No Settlement 3-Closed Before Session

<b><u>Evaluator</u></b>	<b><u># of Cases Assigned</u></b>	<b><u>Results of Sessions</u></b>
Anthony Lamb (**)	28	6-Full Settlement 2-Partial Settlement 7-No Settlement 4-Closed Before Session 3-Out of ENE
Robert E. Manchester	12	1-Full Settlement 8-No Settlement 2-Closed Before Session
Karen McAndrew	20	3-Full Settlement 12-No Settlement 4-Closed Before Session 3-Out of ENE
Thomas E. McCormick	47	6-Full Settlement 25-No Settlement 8-Closed Before Session 3-Out of ENE
Robert R. McKearin	27	6-Full Settlement 14-No Settlement 6-Closed Before Session 2-Out of ENE
Hon. John P. Meaker (***)	6	1-Closed Before Session 1-Out of ENE
William H. Meub	35	17-Full Settlement 12-No Settlement 4-Closed Before Session 3-Out of ENE
James W. Murdoch	25	4-Full Settlement 1-Partial Settlement 17-No Settlement 3-Closed Before Session
Arthur O'Dea (**)	172	58-Full Settlement 1-Partial Settlement 56-No Settlement 33-Closed Before Session 9-Out of ENE
Jerome F. O'Neill	20	7-Full Settlement 8-No Settlement 5-Closed Before Session 1-Out of ENE
Donald J. Rendall (***)	8	3-No Settlement 2-Closed Before Session

<b><u>Evaluator</u></b>	<b><u># of Cases Assigned</u></b>	<b><u>Results of Sessions</u></b>
James W. Runcie (**)	9	2- Full Settlement 2-No Settlement 2-Closed Before Session 1-Out of ENE
Stephen L. Saltonstall	15	2-Full Settlement 6-No Settlement 6-Closed Before Session 1-Out of ENE
Potter Stewart, Jr.	44	8-Full Settlement 19-No Settlement 9-Closed Before Session 6-Out of ENE
Susan M. Sussman (**)	3	1-Full Settlement 1-No Settlement
Joan Loring Wing (**)	31	11-Full Settlement 1-Partial Settlement 6-No Settlement 3-Closed Before Session 2-Out of ENE
Robert E. Woolmington (**)	6	1-Full Settlement 3-No Settlement 1-Closed Before Session
Dinah Yessne (**)	4	1-No Settlement 2-Closed Before Session 1-Out of ENE
<b>TOTAL</b>	1214*	Average = 25

\*\*trained 09/03/98

\*\*\*trained 10/18/01

\*We have omitted data re: Douglas Richards due to his death and James Suskin due to his medical condition.

**EVALUATOR USAGE AS OF 10/31/04**

*(Stipulated To By Parties For Those Not on the Court's Official Roster)*

<b><u>Evaluator</u></b>	<b><u># of Cases Assigned</u></b>	<b><u>Results of Sessions</u></b>
Richard Affolter	2	1-Full Settlement 1-Out of ENE
Leo Bisson	6	1-Full Settlement 2-No Settlement 1-Closed Before Session
Heather Briggs	1	No Session Held Yet
Victoria J. Brown	1	1-Closed Before Session
Daniel Burchard	1	1-Out of ENE
Jim Carroll	1	1-No Settlement
Mark Chadurijian	1	1-Closed Before Session
Gregory Clayton	1	No Session Held Yet
James Coffrin	1	1-No Settlement
John Collins	1	1-No Settlement
Patrick Coughlin	1	1-No Settlement
Geoffrey Crawford	1	1-No Settlement
Lawrin P. Crispe	1	1-No Settlement
Rogert Deitz	1	1-Full Settlement
Denise Deschenes	2	1-Full Settlement 1-No Settlement
M. Jerome Diamond	1	1-No Settlement
Lisa Dolak	1	1-No Settlement
Michael G. Furlong	1	1-No Settlement
James H. Gray	1	No Session held yet
Samuel Hoar, Jr.	2	2-No Settlement
Donald S. Holland	1	1-Full Settlement
Joseph Iandiorio	2	1-No Settlement
John Kassel	1	1-Full Settlement
Christopher Kauders	1	1-No Settlement
John Kellner	1	No Session held yet
Allan R. Keyes	1	1-No Settlement



<b><i>Evaluator</i></b>	<b><i># of Cases Assigned</i></b>	<b><i>Results of Sessions</i></b>
Spencer Knapp	1	1-Closed Before Session
Robert Lotty	1	No Session held yet
Michael Marks	2	1-No Settlement
Hon. David A. Mazzone	3	1-Closed Before Session 2-Out of ENE
Robert McClallen	2	1-Full Settlement 1-No Settlement
Robert Mello	8	1-Full Settlement 5-No Settlement 1-Out of ENE
Gregory Mertz	1	1-Full Settlement
Jerrold A. Olanoff	1	1-No Settlement
David A. Otterman	1	1-Full Settlement
Mitchell Pearl	2	1-Full Settlement 1-No Settlement
Myron Pession	2	1-Full Settlement 1-No Settlement
Robert Rachlin	1	1-Partial Settlement
Amy Rothstein	1	1-Closed Before Sessions
James Spink	28	7-Full Settlement 1-Partial Settlement 13-No Settlement 5-Closed Before Session
Gordon Troy	1	1-Closed Before Session
Oreste V. Valsangiacomo, Jr.	1	1-No Settlement
James Vana	1	1-No Settlement
John B. Webber	5	1-No Settlement 2-Closed Before Session 1-Out of ENE
Glen Yates	4	3-Closed Before Session
John Zawistowski	1	1-Full Settlement
<b>TOTAL</b>	102	Average = 2